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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 357

GORDON WOODROFFE CORPORATION, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Claims (R. 56-64) are reported at 104 F. Supp. 984.

JURISDICTION

The judgment of the Court of Claims was entered June 3, 1952 (R. 64). A motion for rehearing, filed July 2, 1952, was denied on July 15, 1952 (R. 65). The petition for a writ of certiorari was filed September 26, 1952. The jurisdiction of this court is invoked under 28 U.S.C. 1255 (1).

QUESTIONS PRESENTED

1. Whether a special assistant in the Office of the Coordinator for Aid to Greece and Turkey in the Department of State, or the Deputy Coordinator, had authority to commit by contract funds of the United States for the purchase of an electric generating plant for use in the economic rehabilitation of Greece.

2. Whether the prompt repudiation of a contract entered into because of a mistaken belief in the existence of material facts was justified when the true facts became known.

STATUTE AND EXECUTIVE ORDER INVOLVED

The applicable statute (An Act To provide for assistance to Greece and Turkey, May 22, 1947, c. 81, 61 Stat. 103 (22 U.S.C. Supp. V 1401 *et seq.*)) and the Executive Order (E. O. 9857, May 22, 1947 (12 F.R. 3331)) are set out in the Appendix, *infra*, pp. 23-32.

STATEMENT

Petitioner, Gordon Woodroffe Corporation, brought this suit to recover $246,000 (R. 4) for breach and repudiation of a contract claimed to have been entered into between petitioner and the United States. A majority of the Court of Claims held that the government agent had no authority to enter into the contract and dismissed the complaint (R. 64). The background which gives rise to this controversy, and the facts as found by the Court of Claims (R. 31-56), are as follows:

By an Act of Congress, entitled "An Act To provide for assistance to Greece and Turkey" (22

U.S.C. Supp. V 1401 *et seq.*), $400,000,000 was authorized to be appropriated to the President of the United States for use in furnishing military, financial and economic assistance to Greece and Turkey. The President, by Section 5 of the Act, was given the immediate responsibility for administering the aid. He was authorized to "exercise any power or authority conferred upon him pursuant to this Act through such department, agency, independent establishment, or officer of the Government as he shall direct." Section 8 of the Act provided for the appointment by the President of a Chief of Mission to any country receiving assistance under the Act who "shall perform such functions relating to the administration of this Act as the President shall prescribe."

The President, subject to such policies as he might prescribe, delegated his authority under the Act to the Secretary of State (Executive Order No. 9857, (Par. 1) May 22, 1947); subject to the guidance and instructions of the Secretary of State, the Chief of Mission of American Aid to Greece was charged with the direction of United States activities within Greece. The Executive Order authorized the delegation to the Chief of Mission by the Secretary of State of "such powers or authority conferred by this order as he may deem necessary and proper to the effective carrying out of the provisions of the act" (E. O. 9857, Par. 2). The power and authority conferred upon the Secretary of State, subject to the provisions of Paragraph 2, were to be exercised by the Secretary or by such officers and agencies of the De-

partment as he might designate (E. O. 9857, Par. 4). In a Manual of Regulations and Procedures for AMAG [American Mission for Aid to Greece], November 20, 1947, the Secretary of State authorized the Chief of Mission to exercise any powers and authority vested in the Secretary of State "which the chief of mission may deem necessary and proper to the effective carrying out of the Act" (Fdg. 5, R. 33).

Dwight P. Griswold was named as Chief of Mission to Greece and assumed his duties on June 14, 1947, arriving in Athens on July 15, 1947. (Fdg. 3, R. 33). The Aid to Greece program was divided into two main branches, the Military Program and the Civil Program. One of the civil divisions was known as the Industry Division and was headed by Reginald E. Gillmor (Fdg. 5, R. 33-34). In order to assist the Mission in Athens (referred to as AMAG, *i.e.,* American Mission for Aid to Greece) in its needs and to carry out its requests to and with industry and other government departments, the Secretary of State established in Washington, D. C., an office known as the Office of the Coordinator for Aid to Greece and Turkey. George Crews McGhee acted as Coordinator during 1947 and 1948; he was assisted by Walter Wilds as Deputy Coordinator. Aloysius J. Walsh was one of the two special assistants to the Coordinator in Washington (Fdg. 6, R. 34).

In November 1947, Compagnie de Tramways et d'Eclairage de Tientsin, Brussels, Belgium (referred to as "Tientsin") publicly offered for sale a 20,000 KVA turbo-alternator-generator (Fdg.

7, R. 35-36). On November 19, 1947, Gordon Woodroffe Corp., a New York Corporation (referred to as petitioner), was notified by Gordon Woodroffe, Ltd., a British corporation and parent to the petitioner, that it could secure, subject unsold, the alternator-generator at a price of £165,000, f.o.b. Belgian port, payable in the dollar equivalent, at that time, of approximately $665,156.25 (Fdg. 8, R. 36).

Demetrois Loukidis, with offices in Athens, Greece, learned in December 1947, that Tientsin was offering the generator for sale and communicated with Tientsin with reference thereto (Fdg. 9, R. 36). Loukidis contacted the Athens Piraeus Electricity Company, Ltd., (referred to as "APECO"), a British owned public utility supplying electricity to the Athens-Piraeus area in Greece, which indicated an interest in the equipment offered for sale by Tientsin (Fdg. 10, R. 36). Tientsin informed Loukidis by letter, dated December 23, 1947, that the price for the turbo-alternator was 20,000,000 Belgian francs, the equivalent of approximately $457,665 (Fdg. 12, R. 36-37).

On December 19, 1947, petitioner cabled Woodroffe Ltd., London, that it had "customer dollars in New York" and requested a firm 14-day option, inspection certificates, scale drawings and proof of ownership. Under letter dated December 24, 1947, Woodroffe, Ltd., sent scale drawings and specifications (Fdg. 11, R. 36). Apparently at the request of Woodroffe Ltd., George Cohen & Sons Co. Ltd., of Brussels, Belgium, secured from

Tientsin an option running to and including January 25, 1948, to purchase the generator and, through what appears to have been a verbal understanding with George Cohen & Sons Co., Woodroffe, Ltd., was permitted to offer it for sale. On December 30, 1947, Woodroffe, Ltd., informed petitioner by cable that it was granted an option to January 20, 1948 (Fdg. 14, R. 37-38).

Petitioner was represented by a firm of industrial and management consultants, the Wallace G. Rouse Company, which in turn was represented by an attorney, T. W. D. Duke, who maintained an office in Washington. On December 29, 1947, Rouse informed Duke by letter that it was offering for sale the following equipment (Fdg. 15, R. 38):

> One Turbo altinator [sic] 20,000 *KW* 5000 Volts, 3 Phase 50 cycle Turbine runs 300 RPM, 15 kg/cm (2) at 375 Degrees C. [Italics supplied.]

On December 30, 1947, Duke took the Rouse letter of December 29, 1947, to George C. McGhee, Coordinator for Aid to Greece and Turkey, with offices in Washington, D. C., to inquire whether the Coordinator's office knew of any need for the equipment described in the letter. Duke was referred by McGhee to Aloysius J. Walsh, who examined the Rouse letter and discussed the possible need for the described equipment in China and in Greece. Duke told Walsh that he understood the sale price of the equipment was around $900,000 (Fdg. 16, R. 39). Walsh, on the basis of the description of the gener-

ator contained in the Rouse letter, noted on the letter, "Present day cost about $45.00 per kw"[1] (Fdg. 16, R. 39). On December 31, 1947, telegraphic inquiry of AMAG was made by the Coordinator's office as to whether it was interested in a 20,000 *KW* unit being offered at $45.00 per *KW*, or $900,000 (Fdg. 16, R. 39).

Maurice K. Scharff was appointed as an engineering consultant to the Industry Division of AMAG and commenced his assignment in Athens on January 9, 1948. His duties, generally, were to advise AMAG regarding the installation of electrical facilities in Athens, to report on the electric power situation in Greece, and to initiate a program for the development of steam and electric power (Fdg. 25, R. 46-47). The December 31 telegram from the Coordinator's office regarding the 20,000 *KW* unit was brought to his attention, whereupon, on January 12, 1948, he notified the Coordinator's office of AMAG's interest in the 20,000 *KW* plant and requested further technical details (Fdgs. 17, 25, R. 39-40, 46-47). At this time, Scharff did not know of APECO's previously manifested interest in the plant offered by Loukidis (*supra*, p. 5), but he learned of it when he met with the manager of APECO about January 14 or 15 (Fdg. 25, R. 47).

On January 15, 1948, on the basis of Scharff's cable, Walsh wrote Duke regarding the 20,000 *KW* generator Rouse had for sale and advised him of

[1] The Rouse letter described the generator capacity as 20,000 KW but in fact its capacity was 20,000 KVA or the equivalent of only 16,000 KW (R. 53-54).

the cable from Athens indicating interest in the generator and requesting further information (Fdg. 17, R. 40). Drawings and specifications were delivered personally by Rouse to Walsh on January 19, at which time Rouse, when asked about the price, indicated it to be approximately what had been previously discussed with Duke (Fdg. 17, R. 40). The drawings and specifications were transmitted by Walsh to AMAG (Fdg. 17, R. 40) and were received in Athens about January 27 (Fdg. 26, R. 47). Upon examination, Scharff immediately recognized that the equipment referred to in Walsh's telegram was the same unit, although erroneously described as a 20,000 *KW* unit, for which Loukidis, APECO and Tientsin were negotiating (Fdg. 26, R. 47), and which had been called to his attention in Athens after he had cabled Walsh for more information on the plant being offered in the United States.

Scharff addressed a letter dated January 28, 1948, over the signature of the Chief of Mission, to the Secretary of State, in which he pointed out the identity of the unit offered by the petitioner and the one for which APECO had been negotiating with Loukidis and Tientsin; he further pointed out the disparity in the Rouse price (about $900,000) and that of Loukidis (about $458,000). He returned the drawings and specifications forwarded by Walsh and stated that although they were still interested in the unit they were continuing their negotiations with Loukidis in Athens (Fdg. 26, R. 47-48). This letter failed to make the regular

courier and thus was not dispatched until more than a week later and not received in Washington until several days subsequent to Scharff's return to Washington on February 9 (Fdg. 26, R. 49).

Meanwhile, negotiations between APECO, Loukidis, and Tientsin for the purchase of the equipment continued in Europe (Fdg. 19, R. 41). Upon being advised by APECO of its proposed purchase of the generator, Scharff acted as technical advisor to officials of APECO (Fdg. 28, R. 50). AMAG was consulted on the proposed purchase because of its interest in the electric supply in the Athens-Piraeus area and the requirements for supplementing that supply in order to promote the program of economic rehabilitation then being sponsored by AMAG. APECO had made application to the Greek Government for an import and exchange permit to buy the set and had kept AMAG advised of its actions (Fdg. 28, R. 49). On February 3, 1948, a meeting was held with the Governor of the Bank of Greece, attended by representatives of APECO, the Greek Government, and AMAG. As a result of this meeting, APECO agreed to purchase the unit at a price of 23,000,000 Belgian francs in accordance with Loukidis' last offer. An acceptance, subject to confirmation by APECO's London financial agents, was communicated to Loukidis on February 4 (Fdg. 28, R. 50). During this period, AMAG conducted no negotiations and was supplying no funds for the purchase of the unit, its interest being limited to making the necessary foreign exchange available in the event APECO

decided to purchase the equipment (Fdg. 28, 31, R. 50, 52). No one present at the meeting of February 3 knew of the extent of the dealings between petitioner's representatives and the Coordinator's office in Washington (Fdg. 28, R. 50).

Sometime in the latter part of January 1948, petitioner and Woodroffe, Ltd. became aware that APECO was negotiating in Athens for the purchase of the same generator which they were offering and endeavoring to sell to AMAG through the Coordinator's office in Washington (Fdg. 21, R. 42-43). On January 31, Woodroffe, Ltd. obtained from Tientsin an option to purchase the generator, running until February 6, with a provision for extending the option for four weeks upon compliance with specified terms (Fdg. 24, R. 45).

By reason of the delay in the dispatch of Scharff's letter of January 28 to Washington (*supra*, pp. 8-9), Walsh remained unaware of the contemporaneous negotiations being carried on by APECO, Loukidis and Tientsin in Athens (Fdg. 21, R. 42-43). Although this was known by petitioner, Walsh was importuned by the petitioner or its agents to secure a definite answer from Athens regarding the purchase of the generator (Fdgs. 18, 20, 29, R. 40, 42, 50). Because of the imminent expiration (on February 6) of the Woodroffe, Ltd. option, Walsh, on February 5, established telephonic communication with Reginald Gillmor, Chief of the Industry Division of AMAG, in Athens (Fdg. 29, R. 50-51). In a conversation conducted under extremely trying conditions, Walsh

inquired of Gillmor whether a decision had been reached on the purchase of the unit. Gillmor, being aware that the Board of Directors of APECO had decided that APECO would purchase the unit through Loukidis and entertaining the belief that Scharff's letter of January 28 had been received in Washington, stated that it was all settled, that the offer had been made and accepted. Because of his lack of knowledge of the events which had transpired in Athens, Walsh erroneously interpreted Gillmor's statement, *i.e.*, that APECO had decided to purchase the unit, as authority from AMAG to the Coordinator's office to accept the unit on behalf of APECO and AMAG (Fdg. 29, R. 50-51).

Following this conversation with Gillmor, Walsh telephoned petitioner in New York and advised him that a decision had been reached in Athens to purchase the unit subject to inspection. Feeling that the proviso "subject to inspection" was not sufficiently binding and in order to satisfy the inspection requirement, petitioner suggested that the Coordinator's office accept an inspection previously made by a British firm and in reliance thereon to give a firm acceptance. In the course of this telephone conversation, petitioner asked Walsh about the price and Walsh replied that he had heard only one price mentioned, nine hundred and some odd thousand dollars (Fdg. 30, R. 51-52).

Relying upon the inspection by the British firm, which was confirmed by George Cohen & Sons Co., Walsh informed petitioner that further inspection would be waived. He then dispatched to

the petitioner in New York, over the name of Walter Wilds, Deputy Coordinator, a telegram dated February 6, 1948, in which he purported to accept the generator for and on behalf of AMAG and APECO (Fdg. 31, R. 52). Walsh also dispatched telegrams over the name of the Secretary of State advising American Embassies in Athens and London of Wilds' telegram. Although the acceptance was "for and on behalf of the American Mission for Aid to Greece and the Athens Piraeus Electricity Company," on February 9 petitioner acknowledged the acceptance "for United States Government * * * for use by American Mission for aid to Greece and Athens Piraius [sic] Electricity Company" (Fdg. 32, R. 53).

Scharff arrived in Washington on February 9 and reported to the office of the Coordinator and for the first time learned of Wilds' telegram to petitioner dated February 6. He immediately advised the Coordinator's office of the transactions in Athens which he believed to have culminated in a sale, and exhibited to them a copy of the letter he had prepared and the chief of AMAG had sent, dated January 28 (*supra,* pp. 8-9). He further called to Walsh's attention the fact that the generating unit was a 20,000 KVA or 16,000 *KW* unit instead of the 20,000 *KW* previously mentioned in communications between Walsh and Scharff. Upon being apprised of these facts, petitioner was immediately notified that the purported acceptance was based on mistaken information and that all transactions were of no legal effect (Fdg. 33, R. 53-54).

Woodroffe, Ltd. exercised its right to have its option from Tientsin extended from February 6, until March 6, 1948, and, in consideration therefor, paid to Tientsin the equivalent of $25,000. Petitioner reimbursed Woodroffe, Ltd. for this amount, and it was subsequently applied to the purchase price of the generating plant when Woodroffe, Ltd. exercised its right and purchased the equipment from Tientsin on its own behalf for 21,000,000 Belgian francs ($478,800) (Fdgs. 34, 35, 36, R. 54-55). Although the financial agents of APECO had confirmed APECO's acceptance of the Loukidis offer, the direct purchase from Tientsin was not consummated because of Woodroffe, Ltd.'s option, the existence of which became known to Loukidis only after APECO's acceptance (Fdg. 27, R. 49). APECO ultimately purchased the unit from Woodroffe, Ltd. for 23,000,000 Belgian francs ($524,400) (Fdgs. 35, 36, R. 55), Woodroffe realizing a profit of $45,600.

ARGUMENT

The petitioner seeks to recover $246,000 in damages (R. 4) allegedly incurred as a result of the breach and repudiation by the United States of a contract to purchase an electric power plant to be used in effecting the industrial rehabilitation of Greece. The alleged damages represent the difference in the price at which the generator was available to the petitioner and the price at which it was offered to the Government. From the undisputed facts, it is plain that those primarily charged with the direction of United States activities in Greece,

and with whom resided the authority to commit funds of the United States, never contemplated such a purchase. The interest of those American officials was confined to furnishing technical advice to APECO, the prospective and eventual purchaser of the equipment, and to make available to APECO and the Greek Government the necessary foreign exchange (Fdgs. 28, 31, R. 50, 52). Petitioner relies wholly on dealings with Aloysius J. Walsh, a special assistant to the Coordinator for Aid to Greece and Turkey, in Washington, but the Court of Claims found that he was without authority to purchase the power plant offered for sale by the petitioner. In holding that the United States is not bound by the unauthorized acts of its agents, the court below is clearly correct. There is no conflict, and no question of public importance is raised by the petition. The case turns primarily on its particular circumstances. Review by this Court is therefore not merited.

1. The Court of Claims found that "the duties of the Coordinator's office in Washington did not as a matter of departmental routine and policy include purchasing of supplies or materials for AMAG, but the authority with respect to purchases was initially with AMAG, and the Coordinator's office acted in such matters only on the authorization of AMAG" (Fdg. 6, R. 34). This finding by the court is based upon a consideration of all the evidence, and its accuracy is not challenged by the petition. We submit that it is a correct statement of the limited function of the Coordinator's office.

There is nothing in the underlying Act (An Act To provide for assistance to Greece and Turkey, P. L. 75, 80th Cong., 1st Sess., c. 81, May 22, 1947, 61 Stat. 103, 22 U. S. C. Supp. V 1401 *et seq., infra,* pp. 23-30) or in Executive Order 9857, May 22, 1947 (12 F.R. 3331, 22 U. S. C. Supp. V 1405 note, *infra,* pp. 30-32), which, standing alone, gives to the Coordinator's office authority to bind by contract either AMAG, the State Department, or the United States. The Act authorized the President to furnish assistance to Greece and Turkey upon requests by their governments, and upon terms and conditions determined by him. Section 5 of the Act provided:

> The President may from time to time prescribe such rules and regulations as may be necessary and proper to carry out any of the provisions of this Act; and he may exercise any power or authority conferred upon him pursuant to this Act through such department, agency, independent establishment, or officer of the government *as he shall direct.* [Emphasis supplied.]

Section 8 of the Act provided that "the chief of any mission to any country receiving assistance under this Act * * * shall perform such functions relating to the administration of this Act as the President shall prescribe."

The President, by Executive Order 9857 (Paragraph 1), authorized the Secretary of State, "through such departments, agencies, and independent establishments of the government *as he*

may designate, to exercise any power or authority conferred upon the President by the act, including expenditure of funds made available for the purposes of the act." (Emphasis supplied.) Paragraph 2 of the Order provided that the Chief of Mission to Greece, subject to the guidance and instructions of the Secretary of State, "direct United States activities within Greece * * * in furnishing assistance under the act. The Secretary of State may delegate to the Chief of Mission such powers or authority conferred by this order as he may deem necessary and proper to the effective carrying out of the provisions of the act."

Paragraph 4 of the Order provided:

> Subject to the provisions of paragraph 2 hereof, the powers and authority conferred upon the Secretary of State by this order *shall be exercised by the Secretary* or, subject to his direction and control, by such officers and agencies of the Department of State *as he may designate,* in the interest of effective administration and proper coordination of functions under the act. [Emphasis supplied.]

From the above, it clearly appears that the powers and authority conferred by the Act resided initially with the President and were by him delegated to the Secretary of State "to be exercised by the Secretary or * * * through such officers and agencies of the Department of State as he may designate." Absent a designation by the Secretary, neither the Act nor the Executive Order may be construed as a general delegation of authority to

the Coordinator's office any more than it may be so considered with respect to any other subordinate employee or office of the State Department in Washington. *Farm Security Administration* v. *Herren*, 165 F. 2d 554, 563 (C. A. 8), certiorari denied, 333 U.S. 875. On the other hand, the Order does make it plain that, by force of the Order itself, the Chief of Mission in Athens was to "direct United States activities within Greece", and in addition the Secretary of State specifically authorized the Chief of Mission "to exercise, * * * any power or authority vested in the Secretary of State by Executive Order 9857." Manual of Regulations and Procedures for AMAG, November 20, 1947, Sec. 031.1 (Appendix, *infra*, pp. 32-33).

Whatever may have been the authority of the Coordinator, it must have emanated from the Manual of Regulations and Procedures for AMAG, for it was by that publication that the office was created (Sec. 032.1, Appendix, *infra*, p. 33), and its functions delineated with particularity (Sec. 032.2, Appendix, *infra*, pp. 33-34). Sec. 032.1 explicitly provides that the Coordinator "shall, under the direction of the Secretary and Under Secretary and *subject to the authority vested in the Chief of the American Mission* * * * take all necessary action relating to the administration and proper coordination in Washington of functions under the Act."

Manifestly, neither Walsh nor the Coordinator's office derived any authority directly from the Act or the Executive Order, and such delegation as

there was by the Secretary of State was made expressly subject to the authority vested in the Chief of Mission. It is undeniable that the telephonic conversation of February 5 between Walsh and AMAG (*supra*, pp. 10-11), however Walsh may have interpreted it, did not actually authorize the acceptance of petitioner's offer. Walsh was, in fact, never empowered to accept the offer or make a contract. It follows that no valid agreement was ever made, for the law is clear that those dealing with an agent of the United States are charged with notice of the limitations of his authority, and the United States is bound only by the acts of an agent which are authorized. *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380; *United States* v. *City and County of San Francisco*, 310 U.S. 16; *Wilber National Bank* v. *United States*, 294 U.S. 120; *United States* v. *North American Co.*, 253 U.S. 330; *Utah Power and Light Co.* v. *United States*, 243 U.S. 389; *Whiteside* v. *United States*, 93 U.S. 247; *Filor* v. *United States*, 9 Wall. 45; *Farm Security Administration* v. *Herren*, *supra*; *United States* v. *Chickasha Cotton Oil Co.*, 115 F. 2d. 135 (C.A. 10).

Petitioner seeks to escape the effect of this settled rule on the ground of a professed lack of knowledge of the content of the Manual of Regulations and Procedures for AMAG and, since the Manual was not published in the Federal Register, such knowledge cannot be imputed to it (Pet. 9). But the principle is not premised upon the Federal Register Act 44 U.S.C. 305, 311) but rather, as

this Court said in *Wilber National Bank* v. *United States, supra,* pp. 123-124, upon the salutary precept, that "those dealing with an agent of the United States must be held to have had notice of the limitation of his authority." See also the other cases cited, *supra,* p. 18. The reason for the rule is "that it is better that an individual should occasionally suffer from the mistakes of public officers or agents, than to adopt a rule which, through improper combinations or collusion, might be turned to the detriment and injury of the public." *Whiteside* v. *United States,* 93 U.S. at p. 257.

In this case, there is no occasion whatever to depart from the established rule. For the terms of the Act and the Executive Order, which were fully available to petitioner and its counsel, should have warned it to inquire into the authority of those with whom it was negotiating and to probe the relationship between the Coordinator's office and AMAG. And the majority opinion below is not even necessarily based upon imputed or constructive knowledge of the contents of the Manual since, as the findings of fact make plain, the petitioner or its agents, at all pertinent times, actually knew that Walsh's acceptance of the offer was dependent upon and subject to the prior authorization of AMAG (Fdgs. 16, 17, 18, 21, 22, 23, 24, 29, R. 14-16, 18-21, 25-26). (Petitioner's agents also knew of the independent negotiations in Athens. *Supra,* p. 10).

Petitioner further suggests that the Manual does not negative the authority of the Coordinator to

enter into the contract but that its admission in evidence was nevertheless improper (Pet. 9). While the Manual does not expressly negative such authority, neither does it expressly or by implication authorize it. Moreover, as has been pointed out above, such authority as was given to the Coordinator was given subject to that of the Chief of Mission, and, in the words of the Court of Claims, "The Coordinator and his associates * * * acted as the Washington 'contact men' for the Mission to Greece. They did not control that Mission; they were set up to aid it, and to render such assistance as the Mission might request" (R. 59). The position of petitioner would hardly be improved by the exclusion of the Manual. As has already been demonstrated, in the absence of the designation by the Secretary of State contained in the Manual, the Coordinator's office would be without any power at all, for neither the Act nor the Executive Order constitute a direct grant of authority to the Coordinator or his subordinates.

2. Apart from the want of authority of Walsh and Wilds to accept petitioner's offer, the circumstances of the case fully justified the subsequent renunciation of the acceptance and preclude the enforcement of the contract. Not only did Walsh mistakenly believe that AMAG had authorized the acceptance of petitioner's offer, but the generating plant had been represented to Walsh as being of 20,000 KW capacity although it was in fact only 16,000 KW. Walsh labored under this misapprehension at the time he accepted the offer and only

realized the discrepancy upon Scharff's return from Greece. In computing the cost of the equipment, Walsh plainly based his calculations upon the assumption that the equipment was as represented—20,000KW; hence, the notation made by him upon the Rouse letter to Duke of December 29, 1947: "Present day cost about $45.00 per kw." The inference is clear that in accepting the equipment at the otherwise obviously exorbitant price of $906,000, Walsh acted upon the mistaken belief, induced by the innocent misrepresentation of petitioner's agents, that the equipment was of 25% greater generating capacity than it actually was. This, then, was a relevant misstatement of an existing fact, which, when discovered, justified Wilds' timely repudiation of the contract. *Smith* v. *Richards,* 13 Pet. 26; *Taylor* v. *Burr Publishing Co.,* 26 F. 2d 331, 333 (C.A. 2), certiorari denied, 278 U.S. 641; *Lockwood* v. *Christakos,* 181 F. 2d 805, 807 (C.A.D.C.); Williston, *Contracts* (Rev. Ed.) § 1500.

The only harm petitioner can claim that it suffered from this prompt repudiation is the loss of an exorbitant profit. The generating equipment offered by Tientsin was originally priced to Woodroffe, Ltd. and to Loukidis at 20,000,000 Belgian francs ($457,665); Woodroffe, Ltd. offered the plant to petitioner at the approximate dollar equivalent of $665,156.25, an anticipated profit of $207,491.25. Petitioner hoped to sell the identical set to AMAG for $906,000—a profit of $240,843.75, or a total profit of $448,335 on the combined brokerage

transactions of petitioner and its parent. The combined profit of $448,335, considered with the ultimate sale price of $524,400 (which the court below found to be the fair and reasonable market value of the equipment (Fdg. 36, R. 55)), clearly illustrates the gross exorbitancy of the alleged contract price.

3. The legal principles invoked by the Court of Claims are undoubtedly correct. The only debatable issues center on the special powers of a single temporary agency of the Department of State. There is no reason to believe that these narrow issues will arise again or that a review of this case will illuminate the general field of Government contract law or aid in the solution of other controversies.

CONCLUSION

In dismissing the petition, the court below correctly applied a settled legal principle to the particular circumstances presented. It is respectfully submitted that the petition for a writ of certiorari should be denied.

WALTER J. CUMMINGS, JR.,
Solicitor General.
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DECEMBER, 1952

APPENDIX

An Act To provide for assistance to Greece and Turkey (Public Law 75, 80th Cong. 1st Sess., May 22, 1947, c. 81, 61 Stat. 103, 22 U.S.C., Supp. V. 1401 *et seq.*, provides as follows:

Whereas the Governments of Greece and Turkey have sought from the Government of the United States immediate financial and other assistance which is necessary for the maintenance of their national integrity and their survival as free nations; and

Whereas the national integrity and survival of these nations are of importance to the security of the United States and of all freedom-loving peoples and depend upon the receipt at this time of assistance; and

Whereas the Security Council of the United Nations has recognized the seriousness of the unsettled conditions prevailing on the border between Greece on the one hand and Albania, Bulgaria, and Yugoslavia on the other, and, if the present emergency is met, may subsequently assume full responsibility for this phase of the problem as a result of the investigation which its commission is currently conducting; and

Whereas the Food and Agriculture Organization mission for Greece recognized the necessity that Greece receive financial and economic assistance and recommended that Greece request such assistance from the appropriate agencies of the United Nations and from the Governments of the United States and the United Kingdom; and

Whereas the United Nations is not now in a position to furnish to Greece and Turkey the financial and economic assistance which is immediately required; and

Whereas the furnishing of such assistance to Greece and Turkey by the United States will contribute to the freedom and independence of all members of the United Nations in conformity with the principles and purposes of the Charter: Now, therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, notwithstanding the provisions of any other law, the President may from time to time when he deems it in the interest of the United States furnish assistance to Greece and Turkey, upon request of their governments, and upon terms and conditions determined by him—

(1) by rendering financial aid in the form of loans, credits, grants, or otherwise, to those countries;

(2) by detailing to assist those countries any persons in the employ of the Government of the United States; and the provisions of the Act of May 25, 1938 (52 Stat. 442), as amended, applicable to personnel detailed pursuant to such Act, as amended, shall be applicable to personnel detailed pursuant to this paragraph: *Provided, however,* That no civilian personnel shall be assigned to Greece or Turkey to administer the purposes of this

Act until such personnel have been investigated by the Federal Bureau of Investigation;

(3) by detailing a limited number of members of the military services of the United States to assist those countries, in an advisory capacity only; and the provisions of the Act of May 19, 1926 (44 Stat. 565), as amended, applicable to personnel detailed pursuant to such Act, as amended, shall be applicable to personnel detailed pursuant to this paragraph;

(4) by providing for (A) the transfer to, and the procurement for by manufacture or otherwise and the transfer to, those countries of any articles, services, and information, and (B) the instruction and training of personnel of those countries; and

(5) by incurring and defraying necessary expenses, including administrative expenses and expenses for compensation of personnel, in connection with the carrying out of the provisions of this Act.

SEC. 2. (a) Sums from advances by the Reconstruction Finance Corporation under section 4 (a) and from the appropriations made under authority of section 4 (b) may be allocated for any of the purposes of this Act to any department, agency, or independent establishment of the Government. Any amount so allocated shall be available as advancement or reimbursement, and shall be credited, at the option of the department, agency, or inde-

pendent establishment concerned, to appropriate appropriations, funds or accounts existing or established for the purpose.

(b) Whenever the President requires payment in advance by the Government of Greece or of Turkey for assistance to be furnished to such countries in accordance with this Act, such payments when made shall be credited to such countries in accounts established for the purpose. Sums from such accounts shall be allocated to the departments, agencies, or independent establishments of the Government which furnish the assistance for which payment is received, in the same manner, and shall be available and credited in the same manner, as allocations made under subsection (a) of this section. Any portion of such allocation not used as reimbursement shall remain available until expended.

(c) Whenever any portion of an allocation under subsection (a) or subsection (b) is used as reimbursement, the amount of reimbursement shall be available for entering into contracts and other uses during the fiscal year in which the reimbursement is received and the ensuing fiscal year. Where the head of any department, agency, or independent establishment of the Government determines that replacement of any article transferred pursuant to paragraph (4) (A) of section 1 is not necessary, any funds received in payment therefor shall be covered into the Treasury as miscellaneous receipts.

(d) (1) Payment in advance by the Government of Greece or of Turkey shall be re-

quired by the President for any articles or services furnished to such country under paragraph (4) (A) of section 1 if they are not paid for from funds advanced by the Reconstruction Finance Corporation under section 4 (a) or from funds appropriated under authority of section 4 (b).

(2) No department, agency, or independent establishment of the Government shall furnish any articles or services under paragraph (4) (A) of section 1 to either Greece or Turkey, unless it receives advancements or reimbursements therefor out of allocations under subsection (a) or (b) of this section.

SEC. 3. As a condition precedent to the receipt of any assistance pursuant to this Act, the government requesting such assistance shall agree (a) to permit free access of United States Government officials for the purpose of observing whether such assistance is utilized effectively and in accordance with the undertakings of the recipient government; (b) to permit representatives of the press and radio of the United States to observe freely and to report fully regarding the utilization of such assistance; (c) not to transfer, without the consent of the President of the United States, title to or possession of any article or information transferred pursuant to this Act nor to permit, without such consent, the use of any such article or the use or disclosure of any such information by or to anyone not an officer, employee, or agent of the receipient government; (d) to make such provisions as may be

required by the President of the United States for the security of any article, service, or information received pursuant to this Act; (e) not to use any part of the proceeds of any loan, credit, grant, or other form of aid rendered pursuant to this Act for the making of any payment on account of the principal or interest on any loan made to such government by any other foreign government; and (f) to give full and continuous publicity within such country as to the purpose, source, character, scope, amounts, and progress of United States economic assistance carried on therein pursuant to this Act.

SEC. 4. (a) Notwithstanding the provisions of any other law, the Reconstruction Finance Corporation is authorized and directed, until such time as an appropriation shall be made pursuant to subsection (b) of this section, to make advances, not to exceed in the aggregate $100,000,000, to carry out the provisions of this Act, in such manner and in such amounts as the President shall determine.

(b) There is hereby authorized to be appropriated to the President not to exceed $400,000,000 to carry out the provisions of this Act. From appropriations made under this authority there shall be repaid to the Reconstruction Finance Corporation the advances made by it under subsection (a) of this section.

SEC. 5. The President may from time to time prescribe such rules and regulations as may be necessary and proper to carry out any of the provisions of this Act; and he may

exercise any power or authority conferred upon him pursuant to this Act through such department, agency, independent establishment, or officer of the Government as he shall direct.

The President is directed to withdraw any or all aid authorized herein under any of the following circumstances:

(1) If requested by the Government of Greece or Turkey, respectively, representing a majority of the people of either such nation;

(2) If the Security Council finds (with respect to which finding the United States waives the exercise of any veto) or the General Assembly finds that action taken or assistance furnished by the United Nations makes the continuance of such assistance unnecessary or undesirable;

(3) If the President finds that any purposes of the Act have been substantially accomplished by the action of any other intergovernmental organizations or finds that the purposes of the Act are incapable of satisfactory accomplishment; and

(4) If the President finds that any of the assurances given pursuant to section 3 are not being carried out.

SEC. 6. Assistance to any country under this Act may, unless sooner terminated by the President, be terminated by concurrent resolution by the two Houses of the Congress.

SEC. 7. The President shall submit to the Congress quarterly reports of expenditures

and activities, which shall include uses of funds by the recipient governments, under authority of this Act.

SEC. 8. The chief of any mission to any country receiving assistance under this Act shall be appointed by the President, by and with the advice and consent of the Senate, and shall perform such functions relating to the administration of this Act as the President shall prescribe.

Approved May 22, 1947.

EXECUTIVE ORDER 9857

REGULATIONS FOR CARRYING OUT THE PROVISIONS OF THE ACT ENTITLED "AN ACT TO PROVIDE FOR ASSISTANCE TO GREECE AND TURKEY"

By virtue of the authority vested in me by the act of May 22, 1947, entitled "An Act to provide for assistance to Greece and Turkey," hereinafter referred to as the act, and as President of the United States, I hereby prescribe the following regulations for carrying out the provisions of the act:

1. Subject to such policies as the President may from time to time prescribe, the Secretary of State is hereby authorized, through such departments, agencies, and independent establishments of the Government as he may designate, to exercise any power or authority conferred upon the President by the act, including expenditure of funds made available for the purposes of the act.

2. The Chief of Mission to Greece or Turkey appointed by the President pursuant to section 8 of the act shall, under the guidance and instructions of the Secretary of State, direct United States activities within Greece or Turkey, as the case may be, in furnishing assistance under the act. The Secretary of State may delegate to the Chief of Mission such powers or authority conferred by this order as he may deem necessary and proper to the effective carrying out of the provisions of the act and of the basic agreement with the Government of Greece or Turkey, as the case may be, setting forth the general terms and conditions under which assistance is to be furnished.

3. The Secretary of State shall provide, and at his request other departments, agencies, independent establishments, and officers of the Government shall cooperate in providing to the extent considered feasible in keeping with their other established governmental responsibilities and to the extent that funds may be available therefor, such personnel, together with their compensation, allowances, and expenses, and such administrative supplies, facilities, and services as may be necessary and proper to the effective carrying out of the provisions of the act.

4. Subject to the provisions of paragraph 2 hereof, the powers and authority conferred upon the Secretary of State by this order shall be exercised by the Secretary or, subject to his direction and control, by such officers and

agencies of the Department of State as he may designate, in the interest of effective administration and proper coordination of functions under the act.

5. The Secretary of State shall make appropriate arrangements with the Secretaries of War and the Navy, and the heads of other Government departments, agencies, and independent establishments concerned, in order to enable them to fulfill their responsibilities under the act.

HARRY S. TRUMAN.

THE WHITE HOUSE,
May 22, 1947.

Pertinent sections of the State Department Manual of Regulations and Procedures for AMAG, Nov. 20, 1947, are as follows (Fdgs. 4, 5, 6, R. 33-35):

SEC. 013.2 Distribution of the manual will be limited to the Mission in Greece and to other offices of the Department having a functional interest in the Aid to Greece program.

* * * * *

SEC. 031.1 The Chief of the American Mission for Aid to Greece shall, under the policy guidance and instructions of the Secretary of State, direct all United States activities within Greece in furnishing assistance to Greece under the Act to Provide for Assistance to Greece and Turkey, approved May 22, 1947,

Public Law 75, 80th Congress (hereinafter referred to as the Act). The chief of mission is hereby authorized to exercise, in the performance of this function, any powers or authority vested in the Secretary of State by Executive Order 9857, dated May 22, 1947, which the chief of mission may deem necessary and proper to the effective carrying out of the Act and of the basic agreement with the government of Greece setting forth the general terms and conditions under which assistance is to be furnished.

032.1 A Special Assistant to the Under Secretary, with the title of Coordinator for Aid to Greece and Turkey, shall, under the direction of the Secretary and the Under Secretary and subject to the authority vested in the Chief of the American Mission for Aid to Greece and the Chief of the American Mission for Aid to Turkey, take all necessary action relating to the administration and proper coordination in Washington of functions under the Act, approved May 22, 1947 (Public Law 75, 80th Congress) to Provide for Assistance to Greece and Turkey (hereinafter referred to as the Act).

032.2 The Coordinator shall, in particular:

a. Advise and assist the Secretary and Under Secretary in initiating and coordinating the formulation within the Department of policy and planning with respect to assistance to Greece and Turkey under the Act;

b. Advise and assist the Secretary and the Under Secretary in directing and coordinating the activities within the Department, including the allocation of funds, and coordinating the

activities in Washington of all departments, agencies, and independent establishments of the Government under the Act;

c. Serve as the normal channel for communications to or from the Mission for Aid to Greece or the Mission for Aid to Turkey; and

d. Prepare reports to the Secretary and the Under Secretary concerning activities within the Department and of all departments, agencies, and independent establishments of the Government under authority of the Act; and, on the basis of information and reports by the Chiefs of the Missions for Aid to Greece and Turkey, prepare communications to members of the Congress and drafts of reports for submission to the Congress concerning expenditures and activities, including uses of funds by the recipient governments, under authority of the Act.

032.3 The delegation of authority to the Coordinator shall not, however, extend to the determination of policy under the Act, which shall be made by the Secretary and the Under Secretary or by the Chiefs of the Missions for Aid to Greece and Turkey acting within the scope of the authority respectively vested in them; and the Under Secretary may in his discretion exercise any of the authority delegated to the Coordinator by this order.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 357

GORDON WOODROFFE CORPORATION,
Petitioner,

v.

THE UNITED STATES.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Introduction

This brief is in reply to respondent's brief submitted in opposition to the petition herein for certiorari to the United States Court of Claims.

Argument

Respondent's brief (Point I, p. 14) refers to the finding of the Court of Claims that "the duties of the Coordinator's office in Washington did not as a matter of departmental routine and policy include purchasing of sup-

plies or materials for AMAG, but the authority with respect to purchases was initially with AMAG, and the Coordinator's office acted in such matters only on the authorization of AMAG." Such finding, however, does not mean that the Coordinator's office in Washington lacked the power to make such purchases if it saw fit, even though as a matter of routine and policy it was not ordinarily done. As has been set forth in petitioner's main brief, the power to act on such matters was granted to the President by Congress and he, in turn, delegated his power to the Secretary of State. The Secretary of State thereupon established within his department the Office of Coordinator for Aid to Greece and Turkey (Fdg. 6; R. 34). There is no doubt that the Secretary of State had the power to contract and Mr. McGhee, as Coordinator, never doubted the authority of his office to act in such matters as this. At the very commencement of the negotiations for the purchase and sale of this power plant when Mr. Duke first met Mr. McGhee and said he had the generator for sale, Mr. McGhee testified that since this came within Walsh's sphere, "I turned him over to Walsh since that was Walsh's responsibility in the organization" (McGhee Tr. 136). In attempting to cancel the contract by telegram (Pltff's Ex. 23) no question was raised or denial made therein of Mr. Walsh's authority to contract on behalf of the State Department. The cablegram (Deft's Ex. 12) sent by the State Department in Washington to AMAG shows that the senders had no doubts as to their authority and that when unable to contact Athens they did not hesitate to act without obtaining AMAG's approval. That cablegram bearing the signature of Secretary of State Marshall stated "We accepted"—no request for AMAG's ratification was made and none was needed. It is true that many of the powers

delegated to the President by Congress were also delegated in turn by the President not only to the Secretary of State but also to the Chief of American Mission for Aid to Greece. However, it is to be noted that the Chief of the Mission was not empowered to instruct and guide the Secretary of State, but on the contrary the Chief of the Mission was to act under the guidance and instructions of the Secretary of State (Executive Order 9857, Sec. 2). The power and authority of the Secretary of State was paramount to that of the Chief to the Mission. It was therefore not necessary for the Secretary of State or his assistants to await instructions from AMAG to purchase supplies although this may have been done as a matter of departmental routine.

It is true, as pointed out by respondent at page 17 of its brief, that the Executive Order provides that the Chief of the Mission was to direct activities *within* Greece. However, the activities here were negotiations for the purchase and sale of a generator conducted in the United States.

Respondent further states at page 17 of its brief that the Secretary of State specifically authorized the Chief of the Mission to exercise any power or authority vested in the Secretary of State by the Executive Order. Such authorization, however, on the part of the Secretary of State merely enabled the Chief of the Mission to share some of the powers that the Secretary of State had. It did not constitute a surrender and loss of power by the Secretary.

Respondent suggests at page 19 of its brief that from the terms of the Act and the Executive Order petitioner should

have been warned to inquire into the authority of those with whom it was negotiating and to probe the relationship between the Coordinator's office and AMAG. There is, however, nothing in the Act or the Executive Order inconsistent with Mr. Walsh as an assistant to the Secretary of State exercising the powers of that office. Indeed, even if the Manual which concededly was a restricted unpublished inter-departmental paper had been examined, petitioner would only have been alerted to the fact that the Secretary of State shared some of his powers with the Chief of the Mission in Athens. It is not true that petitioner actually knew that Walsh's acceptance was dependent upon and subject to prior authorization of AMAG as charged by respondent at page 19 of its brief. The findings cited in support of such statement simply do not support it.

Under Point 2, page 20 of respondent's brief, excuses are offered, in an attempt to justify the repudiation of the contract, that Walsh was misinformed as to the description of the generator and labored under such misapprehension when he accepted petitioner's offer and also that the profit to be made by petitioner was "exorbitant."

Respondent refers to a notation made by Mr. Walsh on the letter left with him by Duke as to present day cost of the generator. Such notation was not in any way binding upon petitioner and had no probative force. The record is completely devoid of evidence to show that such notation was directed to be made, or that it was a transcript of information given, by Mr. Duke to Mr. Walsh. In the discussion of December 29th regarding the price of the generator, Mr. Duke stated that the price which was being asked for the

set was approximately $900,000.00 (Duke Tr. 68, 74; Fdg. 16; R. 39). Nothing was said by Mr. Duke as to what the value of the set was per kw. The complete description of the turbine and the generator was furnished a short time after that meeting of December 29th when the drawings and specifications were delivered to Mr. Walsh by Mr. Rouse on January 19th (Pltff.'s Ex. 29; Tr. 71; Fdg. 17; R. 40). These drawings and specifications set forth the description of the unit in detail (Pltff.'s Exs. 9a, 9b, 9c; 11). At the time of delivery of the drawings and specifications a receipt (Pltff.'s Ex. 29) was prepared (Walsh, Tr. 101) and it will be noted that the language used in referring to the specifications is precisely the same as the language found on page 1 at the heading of those specifications (Pltff.'s Ex. 11). Mr. Walsh must have examined the paragraph immediately below, which states the correct relation between kw and kva. It reads as follows:

> "The A.C.E.C. TAR type alternator will be designed so as to be capable of producing a continual supply at a power of twenty thousand (20,000) KVA with cos T = 0.8 or sixteen thousand (16,000) KW, producing triphase current at a tension of 5,000 volts between phases, with a frequency of 50 cycles per second, the speed being three thousand (3,000) revolutions per minute."

If, as testified by Mr. Kemp, the respondent's witness, the power factor had been 1 the KW and KVA would have been uniform at 20,000. The power factor is determined by the end use to which the generated current is put, in other words, what the current will be used for such as lighting, heating, power, etc. The power factor is not determined by the unit (Kemp, Dep. 68, 69, 71). Certainly in the preliminary stages of negotiation neither Mr. Rouse

nor Mr. Duke knew of the anticipated power factor. Paragraph 26 on the second page of the specifications which were in Walsh's possession sets forth the output calculations showing varying loads at the power factors of 1 and 0.8. Mr. Walsh was further put on notice as to the description of the generator by the cablegram of January 30th (Pltff.'s Ex. 16) from Mr. Woodroffe to Mr. Walsh transmitted by the American Embassy at Brussels which reads in part as follows: "* * * London hold firm and irrevocable option on the twenty thousand KVA turbo alternator * * *."

Regardless of Mr. Walsh's understanding of the capacity and description of the unit, the undisputed fact is that the respondent had in its possession 18 days before its acceptance, the full and accurate description of the unit and its capacity (Pltff.'s Ex. 29; Tr. 71; Fdg. 17; R. 40).

Mr. Walsh was a highly competent and experienced official of the State Department and had a splendid background and record of thirty years in the purchasing field (Walsh Tr. 91-92) and particularly as a purchasing agent for a large public utility (Walsh Tr. 139). He is presently the Deputy Commissioner of the Federal Supply Service (Walsh Tr. 91). A man of such experience was not misled as to the type of plant he was contemplating purchasing for more than $900,000.00. Any initial misdescription was clarified and corrected by the delivery of the plans and specifications of the generator itself.

Respondent further argues as justification for renunciation of the contract that the price at which respondent was to buy the generator from petitioner was exorbitant and the anticipated profit too high, although no attempt whatsoever was made by respondent to bargain for a lower

price. As noted by Judge MADDEN, "When the Government abandoned its immunity from suit, I think it did not intend to assume the status of an infant or an idiot which could repudiate its contracts if they did not turn out to be advantageous" (R. 64).

The anticipated profit to the petitioner was not exorbitant. Petitioner had an option to buy the generator at the approximate dollar equivalent of $665,156.25 (Fdg. 36; R. 55), and contracted to sell it to respondent for $906,000.00 or a profit of approximately 30% which is not an unusual profit percentage in a commercial transaction.

CONCLUSION

It is submitted that the petition for certiorari should be granted.

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